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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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(9)

No. 1096

PIERCE OIL CORPORATION, AND HENRY C. RIELY AND ROBERT T. BARTON, JR., AS ITS RECEIVERS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF

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Henry C. Riely and Robert T. Barton, Jr., Receivers of Pierce Oil Corporation, pray that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above cause on January 8, 1945.

Jurisdiction

The judgment of the Court of Claims was entered on January 8, 1945. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 288, as amended by the Act of May 22, 1939 (c. 140, 53 Stat. 752).

The Statute Involved

Revenue Act of 1938, c. 289, 52 Stat. 447; Sec. 821. Interest Accruing After October 24, 1933, and Before August 30, 1935, on Delinquent Income, Estate and Gift Taxes.

Interest accruing after October 24, 1933, and prior to August 30, 1935, on delinquent income, estate, and gift taxes shall be computed at the rate of 6 per centum per annum. Any such interest accruing during such period which has been collected prior to the date of the enactment of this Act in excess of such rate shall be credited or refunded to the taxpayer, if claim therefor is filed within six months after the date of the enactment of this Act. No interest shall be allowed or paid on any such credit or refund.

The Question Presented

Shall the taxpayer be denied the right to recover sums aggregating $166,670.87 of statutory interest in excess of the 6% rate for which relief is afforded by Section 821 of the Revenue Act of 1938 (c. 289, 52 Stat. 447), because and only for the reason that the payment of the tax and interest was made under a settlement agreement which specified to a penny the amount of 12% penal interest so involved and collected, that was concluded some two years before enactment of the retroactive relief prescribed by said Statute?

Statement

The facts are briefly summarized as follows:

While the determination of the tax liabilities under the Revenue Act of 1918 for the years 1918, 1919 and 1920 based on the income of Pierce Oil Corporation and its affiliates (herein called Taxpayer) was pending before the Board of Tax Appeals, the Commissioner of Internal Revenue caused jeopardy assessments to be made against the

Taxpayer covering asserted tax deficiencies and deficiency interest thereon to January 11, 1933. On January 13, 1933, the Collector issued jeopardy notices and demands for payment. (Finding 3, R. 20).

Because of its failue to pay within ten days after such notice and demand, "delinquency" interest, which was computed at the penal statutory rate of twelve per centum (12%) per annum, began accruing on the total of tax deficiencies and deficiency interest thereon and continued so to accrue until August 30, 1935 (and thereafter at 6 per cent under the Revenue Act of 1935), until April 30, 1936, when payment was made of the tax liabilities as finally determined (Findings 3 and 4, R. 20-21).

After trial of the controversies pending before it, the Board of Tax Appeals had determined the various issues in the cases, and among other things, ordered special assessment. Various Members of the Board dissented on two issues involving substantial portions of the taxable income upon which the deficiencies were computed (Finding 5, R. 22). No deficiencies were however determinable until special assessment could be concluded. In the course of negotiations relating to special assessment and before entry of any final order by the Board, the parties proceeded with conversations looking toward a final settlement of all controversies, the terms of which were contained in an agreement (Finding 14, R. 29-30) of April 28, 1936 (Defendants' Exhibit 7-A, R. 46-51). The aggregate of the deficiencies and interest to be paid thereunder was $2,035,721.77.[1] (Finding 14, R. 29-30.)

The agreement of April 28, 1936, provided that the parties should stipulate to the Board of Tax Appeals that the deficiencies involved were due entirely from Pierce Oil

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[1] Settlement of an incidental controversy by payment of $27,819.20 for 1920, which involved no issue before the Board, was agreed upon and consummated at the same time, but it is not here involved.

Corporation and were in the amount of $1,063,070.13 (Defendants' Exhibit 7-A, R. 46-51). The agreement further provided that appropriate notice of the Board's final orders fixing the deficiencies, together with proper notices or certificates of overassessment to reduce the jeopardy assessments outstanding to the amounts of the deficiencies should be given promptly by the Commissioner to the Collector, who thereupon should issue promptly notice and demand respecting the deficiencies, adding thereto deficiency and delinquency interest thereon, calculated up to and including April 30, 1936, in the following fixed sums:

For 1918:	$412,013.72
For 1919:	473,610.73
For 1920:	87,027.19

(Defendant's Exhibit 7-A, R. 46-51.)

The Board, where the cases were then pending, had jurisdiction to determine deficiencies in tax only but did not have jurisdiction to make a determination with respect to interest due or to become due on deficiencies. Assessment of deficiency interest at 6 per cent from February 26, 1926, to January 11, 1933, the date of the jeopardy assessment, had also been made and was outstanding on the books of the Collector. The Bureau of Internal Revenue, with the approval of the Commissioner, accordingly made a computation of the delinquency interest for the taxable years due by reason of the jeopardy assessments in the following amounts:

For 1918:	$226,200.25
For 1919:	260,017.71
For 1920:	47,778.92

The final entries on the Collector's books show that the total amount of $2,035,721.77 was credited to payment of

deficiency tax, deficiency interest, and delinquency interest as follows:

Year	Deficiency Tax	Deficiency Interest	Delinquency Interest	Total
1918	$450,314.84	$185,813.47	$226,200.25	$862,328.56
1919	517,637.97	213,593.02	260,017.71	991,248.70
1920	95,117.32	39,248.27	47,778.92	182,144.51
	$1,063,070.13	$438,654.76	$533,996.88	$2,035,721.77

(Finding 20, R. 35).

In accordance with the agreement of April 28, 1936, the Pierce Oil Corporation, on April 30, 1936, delivered to the Collector a certified check in the amount of $2,035,721.77 (Finding 15, R. 30).

If the amounts shown as delinquent interest on the Collector's records had been computed at 6 per cent instead of 12 per cent for the period October 25, 1933, to August 29, 1935, both inclusive, the amounts of such interest paid for each of the years 1918, 1919 and 1920 would have been reduced by the respective amounts of $70,601.53, $81,156.61, and $14,912.73, a total of $166,670.87 (Finding 21, R. 36).

On November 12, 1938, petitioners filed claims for refund of excess interest alleged to have been paid on April 30, 1936 as part of the $2,035,721.77 paid on that day, for the years 1918, 1919, and 1920 on the ground that they had paid interest in excess of 6 per cent per annum on delinquent additional income taxes for each of those years for the period October 24, 1933 to August 30, 1935 and were entitled to a refund of that excess interest under the provisions of Section 821 of the Revenue Act of 1938. The Commissioner rejected those claims on May 21, 1939 (Finding 22, R. 36), and suit was seasonably instituted in the Court of Claims of the United States within two years thereafter, on May 2, 1941 (R. 1). On January 8, 1945, the Court of Claims of the United States held petitioners were not entitled to recover and dismissed their petition (R. 44).

Specifications of Errors to Be Urged

The Court of Claims of the United States in its opinion dated January 8, 1945 (R. 19-44) erred:

1. In deciding that petitioners were not entitled to recover interest in excess of 6 per cent per annum under Sec. 821 of the Revenue Act of 1938 (c. 289, 52 Stat. 447) which accrued subsequent to October 24, 1933 and prior to August 30, 1935.

2. In failing and refusing to decide that petitioners were entitled to recover interest in excess of 6 per cent per annum under Sec. 821 of the Revenue Act of 1938 (c. 289, 52 Stat. 447) which accrued subsequent to October 24, 1933 and prior to August 30, 1935.

3. In failing and refusing to decide that petitioners' payment of $2,035,721.77 included delinquent interest at 12 per cent per annum which accrued subsequent to October 24, 1933 and prior to August 30, 1935.

4. In deciding that petitioners were not entitled to recover interest collected in excess of 6 per cent per annum under Section 821 of the Revenue Act of 1938 (c. 289, 52 Stat. 447) because and only for the reason that the payment of the tax and interest was made pursuant to a settlement concluded prior to the enactment of the retroactive relief prescribed by Section 821.

5. In deciding that the retroactive Section 821 aforesaid which was intended to and did afford relief to taxpayers who had paid 12% penal interest over the period of time therein comprised did not permit recovery of the very type of interest therein contemplated when so computed by established administrative Governmental procedure.

6. In disregarding the final and binding effect of the contract between the parties to the controversy (Defendant's

Exhibit 7-A) whereby the interest for each year was explicitly segregated from the deficiencies because of administrative mandate of the Commissioner of Internal Revenue.

7. In disregarding the explicit acts and procedure in accordance with Governmental administrative mandate as required by law whereby the respondent computed and did collect 12% penal delinquency interest over the period prescribed by said Section 821.

8. In denying the petitioners' motion for a new trial and dismissing their petition.

Reasons for Granting the Writ

1. The decision of the Court below decides a federal question in a manner directly in conflict with the terms of a federal statute.

2. The decision of the Court below decides an important federal question in a manner which is in conflict with the decisions ruling the question.

3. This application involves a question of general importance and of substance relating to internal revenue statutes of the United States enacted to afford retroactive relief which have not been but should be settled by this Court.

4. This application further involves a question of general importance and of substance relating to internal revenue statutes of the United States on the issue whether administrative practice and determination concludes the Government where the same may militate to the advantage of a taxpayer.

I

The Statute in question, Section 821 of the Revenue Act of 1938, provides that any interest in excess of 6 per cent per annum accruing after October 24, 1933 and prior to August 30, 1935 on delinquent income taxes collected prior

to May 27, 1938, shall be credited or refunded to the taxpayer if a claim for refund is filed wit' in the time allowed. The statute makes no exceptions in the case of a prior settlement or compromise or in any other event.

The statute was enacted (Opinion, R. 39) because of an Opinion of the Attorney General rendered on October 24, 1933 (38 Op. A. G. 94) holding that 12% penal interest could not be separately compromised apart from the assessed deficiency to which it attached. The material parts of the Attorney General's Opinion and the authorities relied upon read as follows:

> "The several statutes provided that the interest shall be collected as a part of the tax.
>
> *Big Diamond Mills Co.* v. *United States*, 51 F. (2d) 721, 725 (C. C. A. 8th). See *United States* v. *Childs*, 266 U. S. 304. The two may not be divorced and the interest compromised separately. *Big Diamond Mills Co.* v. *United States, supra*, p. 725; *Colorado Milling & Elevator Co.* v. *Howbert*, 57 F. (2d) 769, 772 (C. C. A. 10th)."

The respondent was bound by that Opinion. By reason of the jeopardy assessment the Commissioner was compelled in 1936 to compute the deficiency interest up to the date of the jeopardy assessment at 6% and the delinquency interest thereafter at 12% until August 30, 1935, the period over which the pertinent statute affords relief.

Notwithstanding the fact that the Attorney General's Opinion, upon which Section 821 was predicated, was rendered on October 24, 1933, the Court below has seen fit to ignore the effect of that Opinion as well as the express purpose for which Section 821 was intended to afford relief, as appears in the excerpt from the Congressional Record quoted verbatim in the Court's opinion.

The sum paid in compromise included interest at 12% between the effective dates. The Commissioner of Internal

Revenue computed interest at 12 per cent (Finding 18, R. 32).

Interest was required to be included in the amount received in settlement, for interest must be collected as a part of the tax; the two may not be divided and the interest compromised separately. *Big Diamond Mills Co.* v. *United States*, 51 Fed. (2d) 721 (C. C. A. 8th, 1931); *Op., Atty. Gen., ubi supra.* The decision of the Court below denying petitioners' right to recover the interest collected—pursuant to the compromise agreement—is directly contrary to the provisions of Section 821 of the Revenue Act of 1938.

II

The decision of the Court below is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Big Diamond Mills Co.* v. *United States, supra,* and the decision of the Circuit Court of Appeals for the Tenth Circuit in *Colorado Milling & Elevator Co.* v. *Howbert*, 57 F. (2d) 769 (1932).

In the *Big Diamond Mills* and *Colorado Milling* cases, interest paid pursuant to compromise agreements was held to be recoverable where the tax was later refunded because the tax and the interest constituted a single liability.

III

This case involves a question of general importance and one of substance relating to the construction and application of the internal revenue statutes of the United States affording a taxpayer retroactive relief which has not been settled or determined by this Court.

Section 821 of the Revenue Act of 1938 is merely symptomatic of countless other statutes affording retroactive relief of which a substantial number are found, for example, in the Revenue Acts of 1942 and 1943.

Attention is invited, among others, to the following enactments:

REVENUE ACT OF 1943	
Sec. 133	Relief in case of excess deductions of estates and trusts.
Sec. 134	Maintenance trusts (*Stuart* case rule).
Sec. 502	Relief—Certain discretionary trusts in connection with gift tax.
Sec. 512	Distributions by Personal Holding Companies.
REVENUE ACT OF 1942	
Sec. 142	Nonrecognition of loss and determination of basis in certain Railroad Reorganizations.
Sec. 222	Excess profits tax relief by reconstructing income in base period years 1936-1939 (Sec. 722 of Code).
Sec. 222	Relief for instalment basis taxpayers and taxpayers with income from long-term contracts. (Added Sec. 736 to Code).
REVENUE ACT OF 1938	
Sec. 813	Remission of interest and penalties on taxes imposed by the Revenue Acts of 1917 and 1918 upon citizens in a possession of the United States.
REVENUE ACT OF 1926	
Sec. 322	Amended Sec. 301(a) of the 1924 Act so as to reduce existing rates and impose the lower rates prescribed by the Revenue Acts of 1918 and 1821.

In many instances, aside from the present case, there have been or will be settlements arrived at involving questions for which the retroactive statute has or will afford explicit relief to the taxpayer. The aspects upon which relief is so afforded frequently do not enter into the consideration of either the taxpayer or the Government at the

time of the settlement because there was then no doubt as to the law.

Such retroactive statutes akin to Section 821, involved herein, are absolute; they do not contain, any more than Section 821, an exception where the tax for the fiscal period affected may have been compromised or settled.

The Taxpayer respectfully submits that there are no decisions by this Court relating to the effect one way or the other of settlements or compromises upon retroactive relief afforded by statute enacted subsequent to the settlement, which is precisely the situation presented hereby.

There is a conflict below, as well, which bears a strong analogy to the situation presented here. The Court of Appeals for the Second Circuit held in *Staten Island Hygeia Ice & Cold S. Co.* v. *United States*, 85 F. (2d) 68 (1936) and *Cloister Printing Corporation* v. *United States*, 100 F. (2d) 355 (1938) that the taxpayer could maintain a suit to recover amounts of taxes and interest paid pursuant to compromise settlement agreements where the tax was later held to have been uncollectible at the time the payment under the compromise settlement was made. On the other hand, the Court of Claims held in *Hord* v. *United States*, 59 F. (2d) 125 (1932) that a compromise settlement agreement precluded the taxpayer's recovery of interest notwithstanding the fact that subsequent to the compromise settlement the collection of the tax was held to have been barred by the statute of limitations.

The increasing frequency of internal revenue statutes affording retroactive relief, and the prospect of future enactments to the same effect resulting from the necessary degree and extent of taxation incident to the present conflict, should impel a determination by this Court of the effect of a compromise or settlement antedating the enactment where the latter does not in terms except cases compromised or settled from the ambit of the relief intended.

IV

By reason of the Attorney General's Opinion of October 24, 1933, and the authorities relied on by him and hereinbefore cited, the Commissioner of Internal Revenue was compelled to compute the delinquency interest upon the jeopardy assessment at 12% upon the sum of the deficiency and the deficiency interest from January 13, 1933, the date of the notice and demand.

The findings as well as the record disclose that the respondent exacted and the Taxpayer paid substantial interest at 12% for the period October 24, 1933 to August 30, 1935 comprised in Section 821 of the 1938 Revenue Act. These payments were made because of administrative and procedural acts as well as requirements of the respondent by which the Taxpayer contends that the respondent is bound.

We respectfully submit that this aspect of the case presents another question of general importance and one of substance relating to the construction or application of statutes of the United States involving the internal revenue which have not been but should be settled by this Court.

The Taxpayer does not seek to invoke any doctrine of estoppel against the Government. The question, on the contrary, is whether penal 12% interest determined, computed and demanded by the Government and paid by the Taxpayer can be transmuted into something else or otherwise disregarded when a retroactive statute affording relief, concededly not contemplated by either party at the time of the settlement, impels its return to the Taxpayer without qualification.

It is respectfully submitted that no decision of this Court has ever passed upon the binding effect of a procedural and administrative determination by a Governmental taxing agency upon relief subsequently afforded by a retro-

active statute, and that a decision of this question should be had in this Court in order that taxpayers as well as the Government may be apprised whether they may or may not rely upon factual circumstances and construction by Government departments, in the interest of certainty properly attendant upon the administration of the tax laws.

WHEREFORE, your Petitioners respectfully pray in

Conclusion

That this petition for a writ of certiorari to review the judgment of the Court of Claims of the United States should be granted.

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